

“Tying Clauses” and the Patent Monopoly

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The patent law of the United States is based on the policy “to promote the progress of science and useful arts by securing for limited times to . . . inventors the exclusive right to their respective . . . discoveries.”¹ The patent statute executes this policy by securing to the patentee a limited monopoly.² On the other hand, it is the aim of federal anti-trust legislation, in particular of the Sherman Act of 1890 and the Clayton Act of 1914, to maintain competitive conditions in business and industry by restraining monopolistic combinations and practices. No wonder, then, that the clash of antagonistic, though perhaps not inconsistent, policies should have led to much litigation in the courts and prolific discussion of underlying legal and economic theory, particularly in view of the early discovery by ingenious business men and their lawyers that patent control offered welcome opportunities of dominating the market generally.

The problems presented by attempts at market control through various uses of the patent device may be conveniently grouped under three main headings: the patent pool, the tying clause as used in connection with patented articles, and resale price maintenance on patented articles. Some or all of these practices are frequently used in combination, so that it may be difficult at times to determine the judicial attitude toward each of them in isolation; *e.g.*, a judicial pronouncement against the tying clause may easily have been influenced by the existence in the particular case of a pooling arrangement. But so it may

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¹ U. S. Constitution, Art. I, sec. VIII, clause 8.

² Rev. Stat. sec. 4884 (1875), 35 U.S.C. sec. 40, provides that “every patent shall contain . . . a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery. . . .”

have been influenced by factors of close consolidation or general predatory practices, and it seems both logically permissible and practicable to consider the tying clause separately, giving due credit to the existence of other elements which may complicate the picture.

The term "tying clause," as ordinarily understood in the legal world, means a consensual arrangement, usually in the form of a condition or covenant in sales contracts or leases of patented articles or in patent license agreements, by which the patent owner attempts to strengthen or acquire monopolistic control over other patented articles or over unpatented materials or supplies, in the distribution of which he is interested. In other words, the term includes what Vaughan³ describes as "dictation of supplementary supplies" and "control of complementary goods." The collection of representative cases contained in the first section of this article will serve to illustrate this abstract definition.

A brief consideration of sociological matter entering into tying clause decisions will form the subject of Section II, which will be followed by an analysis of the legal argumentation employed in justifying or condemning tying clauses.

REPRESENTATIVE CASES INVOLVING TYING CLAUSES IN CONNECTION WITH PATENTED ARTICLES

Up to 1912, when the Supreme Court first "settled" the question of tying clauses, the leading case on the subject had been the so-called *Button-Fastener* case.⁴ The complainant, Button Fastener Co., was, by assignment, the owner of several patents relating to the art of fastening buttons to shoes with metallic fasteners. It sold its patented machines, through jobbers, upon condition that they be used only with fasteners made by it, and each machine bore a metal plate to that effect. When

³ Vaughan, *The Relation of Patents to Industrial Monopolies* (1930) 147 ANNALS 40, 47.

⁴ *Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288 (C.C.A. 6th, 1896).

the Eureka Co. began to make and sell wire staples adapted to use with the patented machine, this suit was brought to enjoin contributory infringement. The lower court sustained a demurrer to the bill, on the ground that the restriction in question operated to create a monopoly in an unpatented article, namely the fasteners, and was therefore void as contrary to public policy. In the Circuit Court of Appeals, this holding was reversed. Circuit Judge Lurton, who wrote the opinion, expressly recognized that there might be limitations upon a patentee's power to contract with reference to the use of his invention by others. The property right of a patentee was admitted to be "subject, as is all property right, to the general law of the land . . ." and it was conceded that contracts respecting the use of inventions and discoveries were "like all other contracts, subject to the limitations imposed by definite principles of public policy. . . ." But in respect of restraints upon the liberty of contracting imposed by principles of public policy, it should be borne in mind that "very high considerations of public policy are involved in the recognition of a wide liberty in the making of contracts . . ." especially with regard to limitations which a patentee might put upon the use of his invention.⁵ The monopoly in the unpatented staple was thought to depend "upon the merits of the invention to which it is a mere incident . . ." and therefore was held to be "neither obnoxious to public policy, nor an illegal restraint of trade. . . ."⁷

In 1912, the Supreme Court decided the first tying clause case reaching it from the lower courts.⁸ The Dick Co. owned patents covering a stencil-duplicating machine known as the

⁵ 77 Fed. 288, 293.

⁶ 77 Fed. 288, 294.

⁷ 77 Fed. 288, 296.

⁸ *Henry v. A. B. Dick Co.*, 224 U.S. 1 (1912). This case was argued after the death of Mr. Justice Harlan and during the absence of Mr. Justice Day. The opinion of the Court was delivered by Mr. Justice Lurton, who, as Circuit Judge, had decided the *Button Fastener* case; with him concurred Justices McKenna, Holmes and Van Devanter. A dissenting opinion was delivered by Chief Justice White, with whom Justices Hughes and Lamar concurred.

"Rotary Mimeograph." Such machines were sold by the Dick Co. with the "license restriction" that they should be used only with the stencil paper, ink and other supplies made by that company. This suit for contributory infringement was brought against one who had sold ink to a purchaser of the Dick machine. The Circuit Court of Appeals for the Second Circuit certified the question whether the defendant's acts constituted contributory infringement of the patents. The Supreme Court first referred to the abundance of cases upholding the right of a patentee to restrict his licensee in respect of time, place, manner or purpose of use, considering this right "so elementary we shall not stop to cite cases."⁹ The Court then recognizes its problem as one of drawing the line "between a lawful and an unlawful qualification upon the use," and calls it "a question of statutory construction."¹⁰ But the Court proposes to approach that question, not with "the narrow scrutiny proper when a statutory right is asserted to uphold a claim which is lacking in those moral elements which appeal to the normal man," but with the liberal interpretation due "a monopoly granted to subserve a broad public policy, by which large ends are to be attained."¹¹ As in the *Button Fastener* case, we find the argument that the market for the sale of supplies to the users of the machine was a market which the patent owner alone had created by making and selling a new invention;¹² and that, if the terms imposed be too onerous, the patented article would not find a market, the public being always free to refuse to accept it.¹³ And then, pointing to the undoubted right of a patentee to let his invention go entirely unused, this significant passage: "This larger right embraces the lesser of permitting others to use upon such terms as the patentee chooses to prescribe."¹⁴ The Court sees

⁹ 224 U. S. 1, 18.

¹⁰ 224 U. S. 1, 26.

¹¹ 224 U. S. 1, 27.

¹² 224 U. S. 1, 32.

¹³ 224 U. S. 1, 34.

¹⁴ 224 U. S. 1, 35. In *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405 (1908), a patentee had been allowed to restrain one who was infringing his patent, although he had, during a long term of years, neither used the invention himself, nor allowed others to use it.

no limitations on patentees' rights in the Sherman Act, and considers arguments based upon suggestions of public policy "not recognized in the patent laws" as not relevant, belonging to the legislative rather than the judicial field; it reminds one of the long line of lower court decisions, overruling which would inflict "disastrous results upon individuals who have made large investments in reliance upon them"; and reaches the conclusion that there is no difference, in principle, between the restrictions in question and restrictions as to the time, place or purpose of use.¹⁵

The dissenting opinion sees a fallacy in the assumption that the right of the patentee himself to employ any desired materials in using the patented machine is a right derived from or protected by the patent law, it being in reality a right arising from the ownership of property (*i.e.*, the machine); therefore, it could not be said that the restriction in question was a restriction upon the use of the machine protected by the patent law.¹⁶

The *Dick* case was overruled, and the *Button Fastener* case thereby discredited, by the *Motion Picture Patents* case of 1917.¹⁷ Reduced to their simplest terms, the facts were that the Patents Co. held patents for improvements in motion picture exhibiting machines; it had licensed Precision Machine Co. to manufacture and sell machines embodying the patented inventions; and the licensee had covenanted to sell such machines only upon the condition, shown by a plate attached to each machine, that they should be used solely with moving pictures leased by a licensee of Motion Picture Patents Co. The defendant Film Manufacturing Co. had supplied a theatre with

¹⁵ 224 U. S. 1, 35.

¹⁶ 224 U. S. 1, 52. In deference to the majority, but hardly making matters any better, the Chief Justice hastens to add that when he said "it cannot be said" he meant that it could not be so done "in reason."

¹⁷ *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917). The opinion of the Court was delivered by Mr. Justice Clarke, with whom Chief Justice White and Justices Brandeis, Day and Pitney concurred, with Mr. Justice McReynolds concurring in the result. A dissenting opinion was delivered by Mr. Justice Holmes, with whom Justices McKenna and Van Devanter concurred.

some of its own films, for use with a machine purchased from the plaintiff's licensee and bearing the required notice. The plaintiff's films, while originally protected by a patent, were unpatented at the time of the alleged infringement. The lower courts held the tying restriction invalid as against the purchaser of the machine, and the Supreme Court affirmed. The Court, professing not to be concerned with any contractual questions,¹⁸ based its decision squarely on the limited scope of the patent grant. The restriction was upon the use of supplies only and could not be termed a restriction upon the use of the machine itself; the patent did not include the right to use the patented machine exclusively with prescribed materials; therefore, control over materials was not protected by the patent law.¹⁹ The argument deducing the right to impose tying restrictions from the right to withhold the patent altogether from public use, which had been sanctioned in the *Button Fastener* and *Dick* cases, is now rejected for its "failure to distinguish between the rights which are given to the inventor by the patent law and which he may assert against all the world through an infringement proceeding and rights which he may create for himself by private contract which, however, are subject to the rules of general as distinguished from those of the patent law."²⁰ To enforce the restriction would be to create a monopoly in moving picture films, wholly outside of the patent covering the machine.²¹

Mr. Justice Holmes rested his dissent upon the patentee's right to keep his device wholly out of use. He saw no predominant public interest contravened by the tying clause, and, like the majority had done in the *Dick* case, pointed to the many

¹⁸ 243 U. S. 502, 509.

¹⁹ 243 U. S. 502, 512, 513.

²⁰ 243 U. S. 502, 514.

²¹ 243 U. S. 502, 518. Sec. 3 of the Clayton Act, enacted before the bill in this case was filed, had been applied to the case by the Circuit Court of Appeals; but the Supreme Court found it unnecessary so to do, being content to accept the statute as "a most persuasive expression of the public policy of our country" (*id.* at 517, 518).

and important transactions which might have taken place on the faith of earlier decisions.²²

In 1918, the Supreme Court handed down its decision in the first *United Shoe Machinery* case.²³ This was a suit by the Government under the Sherman Act to dissolve the United Shoe Machinery combine and to have its leases containing tying clauses declared illegal. While the combination problem in the case is not of immediate interest in our connection, its close relationship to the tying clause problem should be noted. It seems that the Government initially sought condemnation of the tying clauses as a means of completing and assuring the monopoly acquired by combination, but that it finally put its main reliance upon the leases as an independent ground for relief.²⁴ The Company, controlling many important patents and dominating the manufacture of and trade in shoe machinery, leased its patented machines to shoe manufacturers for terms of 17 years. The leases contained various conditions which are enumerated and explained in the opinions.²⁵ The most important of them were the "exclusive use" clause, requiring the lessee of lasting and tacking machinery to use it, to the exclusion of other makes, and the "prohibitive" clause, forbidding the use of the leased machinery in the manufacture of shoes upon which certain prior operations had been performed with machines not leased from the Company. There was also a clause requiring the lessee to obtain all fastening material needed in the operation of the leased machines exclusively from the lessor. Violation of any term of the lease gave the lessor the right to terminate, not only the particular lease, but all other leases which the lessee might have from the United Company. The Supreme Court, through Mr. Justice McKenna,

²² 243 U. S. 502, 519, 520.

²³ *United States v. United Shoe Machinery Co. of N. J.*, 247 U. S. 32 (1918).

²⁴ See, for instance, the opinions of Dodge, Circuit Judge, and Brown, District Judge, in the same case, 222 Fed. 349 (U.S.D.C. Mass., 1915), at 385 and 415 respectively.

²⁵ 247 U. S. 32, 61-63, 68-69.

affirmed the decree of the District Court in the defendant's favor.²⁶ The leases were considered a lawful exercise of the patent monopoly, and the terms imposed by them were said to lie "within the field covered by the patent law" and therefore not to violate the Anti-Trust Act.²⁷ Pointing to the economic advantages of the leasing system to the shoe manufacturer and to the necessity of proper coordination of successive machinery, the Court found that "the installation could have had no other incentive than the excellence of the machines and the advantage of their use, the conditions imposed having adequate compensation and not being offensive to the letter or the policy of the law."²⁸

Mr. Justice Day, dissenting, saw in the tying system an unwarranted extension of the patent monopoly, both in scope and in time, and believed the restrictive and prohibitive clauses to be within the Sherman Act.²⁹ "Whenever a new machine is acquired by the lessee for the period of seventeen years . . . the chain is forged anew which binds him to the use of the lessor's machines, to the practical exclusion of all others."³⁰

The second *United Shoe Machinery* case involved a Government suit under Section 3 of the Clayton Act, brought to restrain the use of tying clauses in the United Company's leases.³¹ The lower court enjoined the use of seven specific provisions, among them the "exclusive use" and the "prohibitive" clauses, and limited the Company's right to cancel leases for a violation of terms to the particular lease whose terms had been broken.³² This decree was affirmed by the Supreme Court.

²⁶ The decision was 4:3, Justices McReynolds and Brandeis taking no part in it. Mr. Justice Day wrote a dissenting opinion in which Justices Pitney and Clarke concurred, and Mr. Justice Clarke wrote a dissenting opinion in which Justices Day and Pitney concurred.

²⁷ 247 U. S. 32, 57.

²⁸ 247 U. S. 32, 63-64, 66.

²⁹ 247 U. S. 32, 73-75.

³⁰ 247 U. S. 32, 70, 71.

³¹ *United Shoe Machinery Corp. v. U. S.*, 258 U.S. 451 (1922).

³² *U. S. v. United Shoe Machinery Corp.* 264 Fed. 138 (U.S.D.C., Mo., 1920). For prior stages of the same case, see 227 Fed. 507 (1915) (preliminary injunction) and 234 Fed. 127 (1916) (motion to dismiss).

Mr. Justice Day, writing the opinion of the court, characterized the tying restrictions as a system which, in view of the United Company's dominating position in supplying machinery of certain classes,³³ practically compelled the use of the machinery of the lessor "except upon risks which manufacturers will not willingly incur."³⁴ The Court overruled the Company's contention that the decree in its favor, rendered in the former suit under the Sherman Act, constituted *rem judicatem* in the present case, holding that the Sherman Act and the Clayton Act provided different "tests of liability" and that the Clayton Act was intended to supplement the Sherman Act, emphasizing the words "whether patented or unpatented" used in Section 3 of the Clayton Act.³⁵ It further held that the Act, as applied, did not deprive the patentee of his property without due process of law, since the patent grant did not limit the power of Congress to prohibit in the public interest the making of agreements which might lessen competition and build up monopoly.³⁶ There was a dissent, without opinion, by Mr. Justice McKenna.

At this point, two decisions by a federal district court may well serve as an illustrative interlude. One of them³⁷ was decided before the Supreme Court had spoken in the second *Shoe Machinery case*. It involved an injunction proceeding by the Westinghouse Company against interference by the Fibre Company with contracts by which the plaintiff had licensed others to manufacture and sell gears covered by certain patents, in consideration of, *inter alia*, the licensees' covenants to purchase all materials employed in such manufacture from the licensor or other designated manufacturers. The defendant contended that the tying clauses in the license agreements were invalid under Section 3 of the Clayton Act. The court, appar-

³³ The Company controlled over 95 per cent of such business in the U. S. 264 Fed. 138, 163.

³⁴ 258 U. S. 451, 458.

³⁵ 258 U. S. 451, 459, 460.

³⁶ 258 U. S. 451, 462-464.

³⁷ *Westinghouse Elec. & Mfg. Co. v. Diamond State Fibre Co.*, 268 Fed. 121 (U.S.D.C. Del., 1920).

ently finding no oppressive monopolistic conditions to exist in the field, held the right to control the unpatented materials to be "an inevitable adjunct of the patent and a part of the patent monopoly," and granted a preliminary injunction; but it was at pains to point out that the question decided in the *Motion Picture Patents* case was "radically different" from the question before it, and furthermore, that the first *Shoe Machinery* case might have modified that decision.³⁸

Eight years later, the same court had to deal with a phase of the radio litigation.³⁹ Radio Corporation controlled certain patents covering radio receiving sets; it licensed manufacturers of such sets to employ those patents and to sell the sets for certain described uses.⁴⁰ The license agreements contained a clause whereby the licensee agreed to purchase from Radio Corporation all vacuum tubes required to make the apparatus initially operative. The tubes were not themselves under patent protection. This suit was brought by manufacturers of other tubes to enjoin the enforcement by Radio Corporation of the tying clause which was alleged to be in violation of the Sherman Act and the Clayton Act. The court granted a preliminary injunction.⁴¹ It conceded the defendant's argument that license agreements were not within Section 3 of the Clayton Act and should not be written into it by judicial legislation, but got around the difficulty by considering the tying clause itself as a contract for the sale of goods within the terms of the Act.⁴² The court's finding that the clause in question substantially les-

³⁸ 268 Fed. 121, 126.

³⁹ *Lord v. Radio Corp. of America*, 24 Fed. (2d) 565 (U.S.D.C. Del., 1928). *Affirmed*, 28 Fed. (2d) 257 (C.C.A. 3rd, 1928). *Cert. denied*, 278 U.S. 648. (1928).

⁴⁰ The attempted limitation of uses to which such sets might be put was not in issue in this case; but *cf.* the *General Talking Pictures* case, *infra* p. 223 *et seq.*

⁴¹ Later, a final injunction issued in the cause. 35 F. (2d) 962 (U.S. D.C., Del., 1929). *Affirmed, sub nom.* *Radio Corp. of America v. DeForest Radio Co.*, in 47 F. (2d) 606 (C.C.A. 3rd, 1931). *Cert. denied*, 283 U.S. 847 (1931).

⁴² 24 F. (2d) 565, 566.

sened competition and tended to create a monopoly in radio tubes was based upon the dominating position of the defendant and its licensees in the business done in receiving sets,⁴³ the natural inclination of licensees to equip all their sets, whether believed to be within the licensor's patents or not, with the licensor's tubes in order to avoid litigation, and the practical tendency of initial equipment to determine replacements.⁴⁴ The *Westinghouse* case of 1920 was distinguished on the ground that a finding of substantial lessening of competition and of tendency toward monopoly was lacking there; furthermore, doubt was cast upon the status of that case in the light of the second *Shoe Machinery* decision.⁴⁵

A case in which no patents were involved was decided by the Supreme Court in 1923.⁴⁶ The Sinclair Co., a manufacturer of gasoline, leased underground tanks with pumps to retail dealers, at nominal rentals and upon condition that the equipment should be used only with gasoline supplied by the lessor. After finding that such restrictions were a general practice in the field and that keen competition was in fact existing, the Court concluded that the tying clauses did not violate the Clayton Act or otherwise constitute an unfair method of competition.⁴⁷

The *Carbice* case of 1931 shows a further development of the tendency first apparent in the *Motion Picture Patents* case and confirmed by the *Radio* case.⁴⁸ This was a suit to enjoin contributory infringement brought by the Patents Development Corporation and Dry Ice Corporation as its exclusive licensee

⁴³ The plaintiffs put the figure at 95 per cent; the defendant conceded a maximum of 70 per cent. 24 F. (2d) 565, 566.

⁴⁴ F. (2d) 565, 568.

⁴⁵ 24 F. (2d) 565, 568, 569. At the final hearing it was shown that the defendant's control in the tube field actually decreased during the period in which the tying clause was in force; but the court attributed this phenomenon to other factors. 35 F. (2d) 962, 963.

⁴⁶ Fed. Trade Commission v. Sinclair Refining Co., 261 U.S. 463 (1923).

⁴⁷ 261 U.S. 463, 473 *et seq.*

⁴⁸ *Carbice Corp. of Am. v. American Patents Development Corp.*, 283 U.S. 27 (1931).

against the Carbice Corporation. The Patents Development Corporation owned a patent for the invention of a package employing solid carbon dioxide as a refrigerant for ice cream or other freezable products and so insulating the dioxide that it was less accessible for exterior heat than the freezable products. The solid carbon dioxide itself was unpatented. Dry Ice Corporation, as the exclusive licensee of the patent, did not manufacture the packages and did not formally license others so to do; but it manufactured and sold solid carbon dioxide, making it a condition of each such sale that the goods should not be used except in containers or apparatus provided or approved by the vendor, and that containers or apparatus provided or approved by the vendor should be used only with the vendor's "dry ice" (solid carbon dioxide). The defendant, another manufacturer of solid carbon dioxide, had sold its product to customers of the Dry Ice Corporation for use in packages like those described in the patent. The Court, assuming the validity of the patent, denied relief on the ground that the attempted limitation of customers to the use of "dry ice" was invalid.⁴⁹ The Dry Ice Corporation was deemed to have extended to each of its customers an implied license to use the invention, upon a condition limiting the licensee to the use of unpatented materials purchased from the licensor. But a patent owner "may not exact as the condition of a license that unpatented materials used in connection with the invention shall be purchased only from the licensor."⁵⁰ The case was thus squarely brought within the broad general principle of the *Motion Picture Patents* case, without any reliance by the Court upon Section 3 of the Clayton Act such as had been placed upon that statute by the lower courts in the *Radio* case.

The *International Business Machines* case⁵¹ presented a suit by the Government under the Clayton Act to enjoin the Inter-

⁴⁹ Later, after reargument, the patent was declared invalid for want of novelty and invention. 283 U. S. 420 (1931).

⁵⁰ 283 U. S. 27, 31.

⁵¹ *International Business Machines Corp. v. U. S.*, 298 U. S. 131 (1936).

national and three other corporations from leasing their tabulating and other machines upon the condition that the lessee should use with such machines only tabulating cards manufactured by the lessor. It appeared that the International Corporation and Remington Rand completely controlled the field, and that they had an agreement to respect each other's lease contracts in the sale of cards. There were patents covering the machines and the cards when perforated, but apparently not cards in the unpunched state. However, the Court was willing to assume in the International's⁵² favor that the cards were protected by patents even in the unpunched state. On that assumption, it affirmed the action of the lower court in granting an injunction. While one purpose of Section 3 of the Clayton Act undoubtedly was to prevent the "tying" of unpatented supplies,⁵³ the practice of tying several patented articles together, revealed in the first *Shoe Machinery* litigation, was as much within the purview of the statute.⁵⁴ The plainly expressed purpose of the statute was to make the lawfulness of the tying clause a matter to be determined "by applying to it the standards prescribed by Section 3 as though the leased article and its parts were unpatented."⁵⁵ The International's contention that without the tying clause an adequate supply of cards would not be forthcoming from competitors was dismissed as not supported by the evidence; and it was said that even if there were any exceptions to the unambiguous command of the Clayton Act, protection of "good will" for the machines could not justify a tying clause designed to eliminate competition.⁵⁶

Two recent cases, decided within a few months of each other, may further serve to illustrate the tying clause problem as viewed by the Supreme Court. In the first of them,⁵⁷ the parties were competing manufacturers of bituminous emulsion—an

⁵² Only the International appealed in the case.

⁵³ See 51 CONG. RECORD, Part 14, 63rd Cong., 2nd Session, 14,089 ff.

⁵⁴ See CONG. RECORD, Vol. 51, Part 14, 63rd Cong., 3rd Session, 14,275.

⁵⁵ 298 U. S. 131, 137, 138.

⁵⁶ 298 U. S. 131, 130, 140.

⁵⁷ *Leitch Mfg. Co. v. Barber Co.*, 302 U. S. 458 (1938).

unpatented article produced in this country by many concerns and in common use by their customers for various purposes. The Barber Co. owned a process patent for a method by which a spray of the emulsion was used to form a film on the surface of cement concrete roads, in order to retard evaporation during curing. The Company did not itself engage in road building or compete with road contractors. It did not grant to road builders a formal license to use the patented process; but any road builder could buy emulsion from it for that purpose, so that such sales implied authority to practice the invention. When Leitch Co. began to sell its emulsion for such use Barber Co. sued it as a contributory infringer. The Court considered the plaintiff's method of doing business as the practical equivalent of granting written licenses to its customers upon the condition that the patented method should be practiced only with emulsion purchased from it. "Thus, the sole purpose to which the patent is put is thereby to suppress competition in the production and sale of staple unpatented material for this use in road building."⁵⁸ Again Mr. Justice Brandeis, who had also written the opinion of the court in the *Carbice* case, rests his decision on the broad ground that "the owner of the patent monopoly, ignoring the limitation inherent in the patent grant, sought by its method of doing business to extend the monopoly to unpatented material used in practicing the invention."⁵⁹

The other 1938 case,⁶⁰ while not directly concerned with the tying clause problem, throws interesting sidelights on it. The American Telephone & Telegraph Co. owned patents for inventions in vacuum tube amplifiers which had been used in wire and radio telephony, talking motion pictures, and other fields.

⁵⁸ 302 U. S. 458, 461.

⁵⁹ 302 U. S. 458, 463.

⁶⁰ *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175 (1938). The opinion of the Court was delivered by Mr. Justice Butler. Mr. Justice Black delivered a dissenting opinion. Justices Roberts, Cardozo and Reed took no part in the decision. It may be of some interest that this case was argued on December 13 and 14, 1937, and decided on May 2, 1938; whereas the *Leitch* case, likewise argued on Dec. 14, 1937, was decided on Jan. 3, 1938.

One, known as the "commercial" field, included talking picture equipment for theatres. Another, called the "private" field, embraced radio broadcast reception, radio amateur reception, and radio experimental reception. Western Electric Co. and others were subsidiaries of the Telephone Co. and were by it exclusively licensed in the "commercial" field, *i.e.*, in making and supplying to theatres talking picture equipment including amplifiers embodying the inventions. In the "private" field, however, Telephone Co., through Radio Corporation of America, granted non-exclusive licenses to others, including the American Transformer Co., which licenses were limited to the manufacture and sale of the amplifiers for private use. Those licenses also required that the amplifiers should have notices affixed to them stating that the apparatus was licensed only for radio amateur, experimental and broadcast reception under the patents in question. The defendant, General Talking Pictures Corporation, was also engaged in furnishing talking picture equipment to theatres. It had purchased amplifiers covered by the patents in question from the American Transformer Co. and included them in the equipment furnished by it to theatres. These suits were brought to enjoin infringement, and the plaintiffs prevailed. The Court, emphasizing that the Transformer Co. was a mere licensee and not a purchaser of apparatus from the patent owner, saw no attempt in this case on the part of the patent owner to extend the scope of the monopoly beyond that contemplated by the patent statute.⁶¹

Mr. Justice Black, dissenting, took the position that the contractual rights of the plaintiffs against the Transformer Co. as licensee could not help them in this infringement suit against a third party. The patent statute, on which alone the plaintiffs could rely, did not empower a patentee to extend his monopoly into the country's channels of trade after a sale which passed title.⁶² The very case before the Court disclosed a "patent pool" system of tremendous proportions, indicating "the possible

⁶¹ 304 U. S. 175, 181.

⁶² 304 U. S. 175, 184, 185.

extent of a power to direct and censor the ultimate use of the multitudinous patented articles with which the nation's daily life is concerned."⁶³

SOME SOCIOLOGICAL CONSIDERATIONS ENTERING INTO TYING CLAUSE DECISIONS

Obviously, it cannot be attempted here to do justice to all of the economic and social conditions surrounding the use of the patent device for the acquisition or reenforcement of monopolistic control. This section will have to be limited to a brief discussion of some of the matters *dehors* strictly legal theory which may, at one time or another, have played a part in the varying fate of the tying clause at the hands of the courts.

One thing is certain: the judges, whether on the majority or on the dissenting side, have frequently, and by no means sparingly, engaged in considerations of general policy in connection with tying clauses, although they have on occasion emphatically disavowed any such intention.⁶⁴

The normal operation of tying restrictions, whether concerning "supplementary" supplies or "complimentary" goods, is readily understood. The patent owner, in all cases where the invention covered by his patent constitutes a great improvement over competitive (patented or unpatented) machines, products or processes, is in a superior bargaining position. He utilizes this advantage, springing from the merits of the particular invention, in order to compel acceptance, not only of the subject matter of his patent, but also of other goods or supplies, patented or unpatented, which might not otherwise find so ready a market. The economic power yielded by a single patent is multiplied where an individual business unit or group controls

⁶³ 304 U.S. 175, 186, 187.

⁶⁴ The Supreme Court said in the *Dick* case: "Arguments based upon suggestions of public policy, not recognized in the patent laws, are not relevant. The field to which we are invited by such arguments is legislative, not judicial." 224 U.S. 1, 35. Compare the earlier statement in the same opinion, characterizing the patent claim as "a monopoly granted to subserve a broad public policy, by which large ends are to be attained." 224 U.S. 1, 27.

numerous important patents relating to a particular line of industry; and power may be further increased by patent pooling and cross-licensing arrangements. Under such conditions, a system of tying restrictions may be thoroughly effective in smothering competition and securing monopolistic control. "The very existence of such restrictions suggests that in its absence a competing article of equal or better quality would be offered at the same or at a lower price."⁶⁵

This passage from Vaughan was quoted with approval by Mr. Justice Brandeis in the *Carbice* case,⁶⁶ and requoted by Mr. Justice Stone in the *Business Machines* case.⁶⁷ But earlier judicial pronouncements had looked at the problem from a different point of view. The majority in the *Dick* case justified control of the market in supplementary goods by the patent owner by pointing out that it "was a market which he alone created by the making and selling of a new invention," and that, if the terms imposed be too onerous, the patented article would not find a market.⁶⁸ Similarly, Mr. Justice Holmes, dissenting in the *Motion Picture Patents* case, saw no predominant public interest involved, because domination of the market in supplies could be only coextensive with the public desire for the patented invention.⁶⁹ On the other hand, the majority in that case, as Chief Justice White had done as a dissenter in the *Dick* case,⁷⁰ professed concern over the increased possibilities of "tying up" many ordinary necessities of life, resulting from modern corporate organization,⁷¹ and similar considerations motivated Mr. Justice Black in his dissent in the *General Talking Pictures* case.⁷²

The argument, advanced occasionally, that "tying" affords

⁶⁵ VAUGHAN, *ECONOMICS OF OUR PATENT SYSTEM*, 125, 127 (1925).

⁶⁶ 283 U. S. 27, 32, note 2.

⁶⁷ 298 U. S. 131, 139.

⁶⁸ 224 U. S. 1, 32, 34.

⁶⁹ 243 U. S. 502, 520.

⁷⁰ 224 U. S. 1, 55, 56.

⁷¹ 243 U. S. 502, 513, 514.

⁷² 304 U. S. 175, 186, 187.

a convenient measure of royalty, because the amount of supplies or materials needed and consequently the profits derived from their sale by the patent owner are proportioned to the use made of the patented machine or process,⁷³ does not seem to have made much of an impression on the courts. Obviously, there are more direct ways in which such proportionment may be achieved.

Technological arguments have met with varying success in the courts. The Supreme Court in the first *Shoe Machinery* case gave express recognition to the necessity of coordination of the various machines operating in succession, a factor much insisted upon by the defendant.⁷⁴ On the other hand, the Court in the *Business Machines* case pointed out that protection of good will did not justify tying clauses, since it could be achieved by requiring the use of (any) material conforming to necessary specifications.⁷⁵

These are some of the considerations peculiarly applicable to tying clause problems. The courts, however, rarely deal with such problems in isolation. And even when they do, their attitude may vary according to the magnitude of the interests involved in the particular case and according to the state of public opinion and of anti-trust feeling and activities in general. How their attempts to adjust conflicting interests have been rationalized in terms of legal doctrine, will form the subject matter of the following section of this article.

LEGAL ARGUMENTATION EMPLOYED IN JUSTIFYING OR CONDEMNING TYING CLAUSES

The "conflict" between the patent monopoly and anti-trust legislation has been the subject of much discussion among legal writers. Some of them recognize the existence of such

⁷³ See, for instance, Montague, *The Sherman Anti-Trust Act and the Patent Law*, 51 (Reprint from YALE L. J., 1912).

⁷⁴ 247 U. S. 32, 64. *Defendant's Brief on Reargument*, 21-24.

⁷⁵ 298 U. S. 131, 140.

a conflict.⁷⁶ Others deny it.⁷⁷ It seems idle to go into metaphysical speculations on this point. The policies underlying patent and anti-trust legislation, respectively, may well be regarded as antagonistic, though not mutually inconsistent. But whether the two groups of statutes be in "conflict," or "contact," or in the relation of general rule and exception, or entirely heterogeneous, it is a fact that the courts have experienced considerable trouble in defining and delimiting the respective spheres of operation.

In dealing with the tying clause problem, the Supreme Court has by no means pursued a consistent course. At first, in upholding the tying clause in the *Dick* case, it relied mainly on the theory that the whole includes all its parts; *i.e.*, the patentee's right to let his invention go to waste was held, by argument *a fortiori*, to embrace the lesser right of permitting its use upon such terms as he might choose to prescribe.⁷⁸ An English judge has carried this notion to its extreme by saying that it did not matter how unreasonable or absurd the conditions were.⁷⁹ Obviously, there must be some limitations to such anti-social doctrine.⁸⁰ The *Button Fastener* case conceded that

⁷⁶ See, for instance, Montague, *The Sherman Anti-Trust Act and the Patent Law*, Reprint from YALE L. J. (1912), 36 f., seeing "flat contradiction" and "mutual inconsistency," and using the very conflict as a basis for his argument in favor of the tying clause; on the other hand, see Peaslee, *The Effect of the Federal "Anti-Trust Laws" on Commerce in Patented and Copyrighted Articles* (1915) 28 HARV. L. REV. 394, seeing "contact, if not conflict," but arguing that the patent law does not confer the right to make tying contracts (at 404).

⁷⁷ See, for instance, Lamb, *The Relation of the Patent Law to the Federal Anti-Trust Laws* (1927) 12 CORN. L. Q. 261, regarding patent rights as a valid exception to the prohibitions of the Sherman Act (at 266). Feuer, *The Patent Monopoly and the Anti-Trust Laws* (1938) 38 COL. L. REV. 1145, goes furthest in finding a "no-man's land" between patent monopoly and Clayton Act, properly interpreted (at 1165-1168).

⁷⁸ *Supra*, note 14.

⁷⁹ Incandescent Gas Light Co., Ltd., v. Cantello, 12 Pat. Cas. 262 (1895).

⁸⁰ In England, tying clauses of any kind are now outlawed as being in restraint of trade and contrary to public policy, and insertion of any such clauses in sale, lease or license agreements affords a complete defense in infringement suits. Patents and Designs Acts of 1907, 7 Edw. VII, c. 29, s. 38, as amended by Act of 1919, 9 and 10 Geo. V., c. 80, s. 20.

the patentee's rights are subject to "the limitations imposed by definite principles of public policy."⁸¹ It just seems that the courts in the earlier days, up to the time of the Clayton Act, did not regard the principles of public policy prevailing at common law and under the Sherman Act as being sufficiently "definite."

Mr. Justice Holmes, in his dissent in the *Motion Picture Patents* case, reasoned that "generally speaking, the measure of a condition is the consequence of a breach, and if that consequence is one that the owner may impose unconditionally, he may impose it conditionally upon a certain event."⁸² Of course, if the condition is broken, and the patent owner thereupon withdraws the privilege of use, it is quite true that the resulting state of things is no different from that brought about by an initial refusal to grant the privilege. But this overlooks that a condition may also be measured by the consequence of its observance; in fact, the patent owner would ordinarily be interested in having the condition respected rather than violated; and here it is that anti-trust policy comes in.

The majority in the *Dick* case recognized the problem as one of drawing the line between a "lawful" and an "unlawful" qualification upon the use,⁸³ but came to the conclusion that the tying restriction in question was not different, in principle, from qualifications in respect of time, place or purpose of use which had always been recognized by the courts.⁸⁴ But was there really no "difference in principle," if those words may be taken to include marked differences in degree? The patent statute itself allows a patentee to grant an exclusive right under his patent "to the whole or any specified part of the United States."⁸⁵ The theory of a "partial" grant may also quite logically be applied to limitations in time. And even of limitations in respect of purpose of use it may be said that they do no more than delimit a partial grant, reserving to the patent

⁸¹ 77 Fed. 288, 293.

⁸² 243 U. S. 502, 519.

⁸³ *Supra*, note 10.

⁸⁴ *Supra*, notes 9 and 15.

⁸⁵ REV. STAT. sec. 4898 (1875); 35 U.S.C. sec. 47 (1934).

owner the right to exclude others from all uses not granted. But there comes a point where the line must be drawn between a partial grant on the one hand, and a grant with a collateral restriction on the other. It seems rather strained to regard a tying clause as a definition of what is granted and what is reserved by the patent owner, and to say that he merely "splits" his exclusive right to use in such cases.⁸⁶ The Government aimed at a *reductio ad absurdum* of such logic when, in the second *Shoe Machinery* suit, it put the imaginary case of an owner of a gun patent who "could not, by leasing a gun and reserving all use of the invention except that of killing the maker of a competing gun, make such a condition legal by giving it the form of a reservation of the use of a patent."⁸⁷

The argument *a fortiori*, based upon the patent owner's right to keep his device wholly out of use, has a counterpart in the attempt sometimes made to identify the imposition of a tying clause with the setting of a price by the patent owner. Thus, the *Dick* case implies that the owner may "choose to take his profit in this way, instead of taking it by a higher price for the machines."⁸⁸ A short answer to this would seem to be that neither in common understanding nor in law are conditions considered as the equivalent of price, and while it is the normal policy of the law not to limit the compensation asked and received by the owner of property, it is its policy to maintain competitive conditions in the market.

The decision in the *Motion Picture Patents* case, allowing an alleged infringer to defend on the ground of invalidity of the tying restriction, reached that result on general grounds, but regarding the Clayton Act as a persuasive declaration of public policy.⁸⁹ No such favorable recognition was accorded the Act

⁸⁶ On the question of divisibility of the patent right, see Powell, *The Nature of a Patent Right* (1917) 17 COL. L. REV. 663. Professor Powell comes to the conclusion that the answer to that problem depends upon the practical consequences attendant on the division in question (at 683-684).

⁸⁷ 258 U. S. 52; Cases and Points, Brief for the United States, p. 41.

⁸⁸ 224 U. S. 1, 50.

⁸⁹ *Supra*, note 21.

in the first *Shoe Machinery* case, decided the following year, but it should be pointed out that proceedings in the case had been commenced before the enactment of the statute. Technically, that case was distinguished from the *Motion Picture Patents* decision on the ground that the United Shoe Machinery Company leased its machinery, whereas the Patents Company had sold its machines; and a patent owner "cannot grant the title and retain the incidents of it." But it does not appear from the opinion in the *Picture Patents* case that the Court had relied very heavily on such reasoning; in fact, the opinion deals almost exclusively with the scope of the patent monopoly.

It should be said here generally that the distinction between sale, lease, or license, whatever its significance may be in other connections, does not seem to be a proper basis for a differentiation in tying clause problems. For one thing, we are concerned here with statutes aimed at the maintenance of competitive conditions, not with the common law policy against restraints on alienation. Moreover, the Court itself does not now regard such a distinction as controlling. Of course, Section 3 of the Clayton Act expressly mentions leases, along with sales or contracts for sale, in its prohibition of tying clauses. But the Court has gone further and has held that even a licensee cannot be limited to exclusive use of materials furnished by the licensor.⁹⁰ On the other hand, it decided the same year that a patent owner may dictate the purpose to which his device may be put even by an outright purchaser from his licensee.⁹¹

When Congress had before it the bill which became Section 3 of the Clayton Act, it could not foresee what the Supreme Court would pronounce as the law in 1917 and 1918; but it was familiar with the decision in the *Dick* case and with the contentions of the parties in the first *Shoe Machinery* case.⁹²

⁹⁰ *Leitch Mfg. Co. v. Barber Co.*, 302 U.S. 458 (1938).

⁹¹ *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 (1938).

⁹² *International Business Machines Corp. v. U. S.*, 298 U.S. 131 (1936), at 137.

An argument was made, by the corporation bar and in the brief for the defendants on reargument of the second *Shoe Machinery* case, to the effect that the Clayton Act was merely declaratory and rendered nothing unlawful which had not been unlawful before; but the second *Shoe Machinery* case established the contrary.⁹³ The reasoning by which the Court arrived at that result has aptly been described as "resourcefully tugging at its own boot-straps."⁹⁴ The tenuous ground on which the *Motion Picture Patents* case had been distinguished in the first *Shoe Machinery* case has already been noted. But while the result in the second *Shoe Machinery* case is easily justifiable on its own grounds, it took considerable reasoning in a circle to reconcile that decision with the former opinion in the Sherman Act suit, even apart from the question of *res judicata*. The former case had definitely decided that the lessor of a patented machine had the right to impose tying restrictions, such right being part and parcel of the patent monopoly. But now the Court discovers that "the patent right confers no privilege to make contracts in themselves illegal, and certainly not to make those directly violative of valid statutes of the United States."⁹⁵ Of course, the very question to be decided was whether Section 3 of the Clayton Act was a "valid statute of the United States," in view of the fact that it cut down on rights which the Court in 1918 had held to have been within the patent monopoly. Had the first *Shoe Machinery* case been expressly overruled in its construction of the patent grant, no such difficulties would have

⁹³ McLaughlin, *Legal Control of Competitive Methods* (1936), 21 IOWA L. REV. 274, at 281. Even before the first *Shoe Machinery* decision, it had been argued—and very convincingly—that the Sherman Act already had the effect of prohibiting all contracts in restraint of trade (qualified only by the "rule of reason"), that the test under Sec. 3 of the Clayton Act did not differ greatly from that, and that the words "whether patented or unpatented" in the latter statute were unnecessary. Peasles, *The Effect of the Federal "Anti-Trust Laws" on Commerce in Patented and Copyrighted Articles* (1915) 28 HARV. L. REV. 394.

⁹⁴ Feuer, *The Patent Monopoly and the Anti-Trust Laws* (1938) 38 COL. L. REV. 1145, 1160.

⁹⁵ 258 U.S. 451, 463.

confronted the Court. That the second case in effect overruled the first by discarding its theory,⁹⁶ seems to be a point well taken. It may be suggested, however, that the Court, had it been prepared to overrule the earlier decision, might have found it even harder to dispose of the defense of *res judicata*.

The decision of the United States District Court for Delaware in the *Westinghouse Electric* case⁹⁷ hardly merits extended discussion here, in view of the later decision by the same court in the *Radio* case.⁹⁸ The *Westinghouse* decision was rendered at a time when the first *Shoe Machinery* case was the law of the Supreme Court; but after that Court had decided against the same defendant in the Clayton Act suit, the District Court for Delaware found it difficult to reconcile its former decision with the new law;⁹⁹ its half-hearted attempt, in addition to that, to distinguish the earlier case on the facts must be regarded as mere make-weight, in view of the fact that the *Westinghouse* opinion had looked upon the right to control unpatented materials as "an inevitable adjunct of the patent and a part of the patent monopoly."¹

The important point in the *Radio* decision was its theory that the tying clause itself could be considered as a contract for the sale of goods within the meaning of Section 3 of the Clayton Act.² Even though the tying clause in question "tied" the tubes to the apparatus to be manufactured by a licensee, even though there was neither sale nor lease of such apparatus but merely a license to manufacture it under the licensor's patents, the court found it possible to make Section 3 of the Clayton Act the basis of its decision.

The Supreme Court has been more cautious in its statutory construction, but has gone even further by condemning tying

⁹⁶ McCormack, *Restrictive Patent Licenses and Restraint of Trade* (1931)

31 COL. L. REV. 743, 756.

⁹⁷ *Supra*, note 37.

⁹⁸ *Supra*, note 39.

⁹⁹ *Supra*, note 45.

¹ *Supra*, note 38.

² *Supra*, note 42.

clauses without the aid of the Clayton Act. Both the *Carbice* case³ and the *Leitch* case⁴ were decided on broad general principles. The former, employing the notion of an implied license to use the patented invention, arising from each sale of unpatented "dry ice," had an express tying clause to rely on which had been made a condition of each such sale. But the *Leitch* case went to the limit yet reached by establishing the principle that even in the absence of both an express license and a tying clause, the patent owner may not by his "method of doing business" achieve the same practical result as would be brought about by the use of a tying clause.

The *International Business Machines* case⁵ presented a straight tying clause attached to leased machinery, and the decision could—as it necessarily had to—be based squarely upon the Clayton Act which was held to prohibit the tying of patented as well as unpatented supplies to leased machinery.

The *Sinclair* case⁶ has been included in this article because it is a fairly late case upholding a tying restriction in the absence of any patents, thus standing in significant contrast to the second *Shoe Machinery*, *Carbice*, *Business Machines*, and *Leitch* cases and demonstrating, by way of reflex, how completely the Court has freed itself of the notion that patent protection has any bearing on the validity of tying clauses; indeed, the existence of such protection may now constitute one of the elements vitiating a tying arrangement. It should be remembered that the Clayton Act condemns the tying clause only where the effect of the lease, sale, or contract for sale to which it is attached, or the effect of the tying clause itself, "may be to substantially lessen competition or tend to create a monopoly in any line of commerce;" and no such effect or tendency was found to exist in the *Sinclair* case.

The *General Talking Pictures* case⁷ has already been noted

³ *Supra*, note 48.

⁴ *Supra*, note 57.

⁵ *Supra*, note 51.

⁶ *Supra*, note 46.

⁷ *Supra*, note 60.

in connection with the possible distinction between sale, lease and license and its bearing on our problem.⁸ It further tends to confirm the view that there are no fixed mechanical rules governing the limits to a patent owner's right to control the use of his invention by others. The case need not be taken as an indication that the tendency of the Court manifested in the *Carbice* and *Leitch* cases has been reversed, although some such fear may have played a part in causing Mr. Justice Black to dissent. One may certainly argue that the right to determine the nature of the use of a patented device is within the class of "partial reservations" always recognized by the courts and that the division of a patent monopoly into rights to exclusive use in the "commercial" and "private" fields, respectively, is reasonable enough, without at the same time admitting the legitimacy of attempted control over supplementary or complementary goods and the reasonableness of bringing such collateral restrictions under the category of partial reservations. In fact, the Court has since reaffirmed the principle that a patent owner "may not, by virtue of his patent, condition his license so as to tie to the use of a patented device or process the use of other devices, processes or materials which lie outside of the monopoly of the patent licensed,"⁹ and the broad doctrine of the *Carbice* and *Leitch* cases has been applied by several lower federal courts.¹⁰

⁸ *Supra*, p. 231, *et seq.*

⁹ *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 456 (1940), a suit under the Sherman Act to enjoin an elaborate patent license system principally on the ground that it was used for the purpose of resale price maintenance. While made primarily with reference to control of prices and market practices, the following statement (at 459) is also significant: "The patent monopoly of one invention may no more be enlarged for the exploitation of a monopoly of another . . . than for the exploitation of an unpatented article. . . ."

¹⁰ *J. C. Ferguson Mfg. Works, Inc. v. American Lecithin Co.*, 94 F. (2d) 729 (C.C.A. 1st, 1938); *American Lecithin Co. v. Warfield Co.*, 105 F. (2d) 207 (C.C.A. 7th, 1939) (extending the doctrine to a suit for direct infringement); *Philad Co. v. Lechler Laboratories, Inc.*, 107 F. (2d) 747 (C.C.A. 2nd, 1939) (rule not limited to attempted control of "staple materials"; nor is its operation prevented by the fact that the goods sought to be "tied" are themselves under patent), but *cf.* *Johnson Co., Inc. v. Philad Co.*, 96 F. (2d) 442, 446 (C.C.A. 9th, 1938) (strong intimation that rule applies

CONCLUSION

A study of tying clause cases involving patented machines, products or processes reveals a complicated interplay of notions of public policy, common law principles, statutory construction, and constitutional limitations. Varied and heterogeneous considerations have been used to support judicial pronouncements at different times; but judicial attitude has not at all times been determined by the elements used in its rationalization.

There was a long period during which the patent monopoly was regarded as including the right to impose tying clauses; that is to say, that right was thought to be derived from the patent statute, if not the Constitution, and grave doubts were attendant upon constitutionality of Congressional legislation depriving the patent owner of his right; the constitutional problem could, however, be avoided by a construction of such legislation as not purporting to cut down the right. But the Sherman Act was supplemented by the specific prohibitions of the Clayton Act, and the only way left then to avoid the constitutional issue was to narrow down the Court's construction of the patent grant—a way which had been paved by the *Motion Picture Patents* decision, but blocked again in the first *Shoe Machinery* case. The cases from the *Motion Picture Patents* to the *Leitch* case condemning the tying clause on general grounds, without the direct aid of a statute, definitely recognized and settled the limited scope of the patent monopoly.

It thus appears that, in spite of its early existence,¹¹ the patent monopoly had no predetermined boundary lines, any more than other types of individual property rights. While the Court has frequently insisted upon a contrary premise, the

only to "standard articles of commerce," to "standard unpatented articles"); *B. B. Chemical Co. v. Ellis*, 32 F. Supp. 690 (U.S.D.C. Mass., 1940). See also *Alemite Corporation v. Lubrain Corporation*, 62 F. (2d) 899 (C.C.A. 1st, 1933) (construing the scope of a patent narrowly so as not to conflict with the doctrine of the *Carbice* case or, perhaps more accurately, its underlying policy).

¹¹ For a brief general outline of the history of patent law in England and this country, see Lamb, *The Relation of the Patent Law to the Federal Anti-Trust Laws* (1927) 12 CORN. L. Q. 261, at 261-265.

approach must be from a different side. No matter how strong and beneficial to society the policy underlying the patent law may be, the privileges conferred upon the patent owner are in derogation of the common right. Our present economic system, in theory if not always in action, rests upon the policy of maintaining free competition, even apart from legislative declarations of such policy. It is that public interest which in the final analysis defines the scope and contents of the patent monopoly, just as the public interest involved in the particular case has determined the boundaries of "liberty and property" generally.

The state of the law may then be summarized as follows: The tying clause, while not illegal by and in itself, will be condemned where it may tend to a substantial lessening of competition or to a monopoly in any line of interstate or foreign commerce. It matters not whether it be attached to sale, lease, or license; it makes no difference whether it bind patented to patented, patented to unpatented, unpatented to patented, or unpatented to unpatented machinery, supplies, or processes; and it may be struck down either with or without the aid of a statute. The controlling consideration is its effect on competition, to an extent which has made the very term "tying clause" too narrow; because, finally, it is immaterial whether or not there be a "clause," or even a tacit consensual arrangement, at all: a mere "method of doing business," if bringing about the same undesirable result, is now given the same legal effect of a defense in infringement proceedings, although it might not, under existing statutes, supply a basis for affirmative action against its user.

It is probably due to the Supreme Court's sweeping repudiation of "tying," even more than to the express language of the Clayton Act, that the practices considered in this Article no longer constitute a prominent problem of law reform. The future will show how other abuses of the patent system can be corrected, legislatively and judicially, and in what respects the system itself may need possible modifications in order best to serve the common good.